INDEX

CITATIONS

Cases

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 112

JAMES H. GRAY, ET AL., APPELLANTS

v.

JAMES O'HEAR SANDERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the three-judge district court (R. 182) is reported at 203 F. Supp. 158.

JURISDICTION

The order of the three-judge district court was entered on April 28, 1962 (R. 204–205). The notice of appeal to this Court was filed on May 2, 1962 (R. 205), and probable jurisdiction was noted on June 18, 1962 (370 U.S. 921; R. 213). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether a state law which requires that primary elections for Governor, Senator, and other statewide

officials be conducted under a county unit plan that grossly and systematically dilutes the votes of residents of populous counties violates the equal protection or due process clause of the Fourteenth Amendment.

2. Whether such gross and systematic discrimination is unconstitutional in primary elections conducted pursuant to a rule of a political party where such primaries are closely regulated by state law and, in practice, finally determine the selection of all statewide officeholders.[1]

STATUTES INVOLVED

Sections 34–3212 to 34–3218, Georgia Code Annotated, as amended by the Act of April 27, 1962 (Ga. Laws, 1962 Ex. Sess., p. 1217), are set forth in Appendix A.

INTEREST OF THE UNITED STATES

On March 26, 1962, this Court decided *Baker* v. *Carr*, 369 U.S. 186, which held that the federal courts have jurisdiction to consider whether arbi-

[1] We do not discuss three other issues which are involved in this case: (1) whether, as the district court held, the Georgia county unit system would be valid if it did not result in inequality greater than that in the electoral college or under the "equal proportions" system for representation of the States in Congress (see *infra*, pp. 61–63); (2) whether the county unit system as such, regardless of the inequality under it, violates the Fourteenth Amendment; and (3) whether the Seventeenth Amendment prohibits use of any county unit system in the election of Senators. We do not believe these questions need be reached by this Court since the Georgia county unit system for the election of Senators and other statewide officials, as it in fact exists, violates the Fourteenth Amendment.

trary apportionment of state legislatures violates the Fourteenth Amendment; that this issue is not a non-justiciable political question; and that voters who have suffered discrimination have standing to bring such an action. The United States participated in that case as *amicus curiae* because of the far-reaching issues presented. The decision in *Baker* v. *Carr* has resulted in a large amount of litigation in federal and state courts,[2] of which the present case is the first to reach this Court.

The principal constitutional issue in this case is whether Georgia's statute, which allocates much greater weight to some votes than to others in tabulating the results of primary elections involving the United States Senate and other statewide offices, is consistent with the Fourteenth Amendment. The other, closely related, constitutional issue is whether a political party, by party rule, may adopt this course when the primary election is closely regulated by state law and is the only meaningful election.

These are fundamental questions concerning the power of a State and political party to make distinctions among voters casting ballots in the same election. In addition, they bear upon the distinct, but related, problem of the standards which should govern in determining whether the malapportionment of seats in legislative bodies is valid under the Four-

[2] Cases involving the problem of geographical discrimination in the apportionment of seats in state legislatures which have been decided since *Baker* v. *Carr* are collected in *Court Decisions on Apportionment*, issued by the National Municipal League. Three volumes have been published to date.

teenth Amendment. Thus, this case involves issues of great importance to millions of American citizens seeking full and fair participation in their federal and state governments.

STATEMENT

1. *The Complaint and the District Court Proceedings.*—This action was brought on March 27, 1962, in the United States District Court for the Northern District of Georgia, Atlanta Division, by the appellee, a citizen of the United States and the State of Georgia, who is also a resident of Fulton County, Georgia, a member of the Democratic Party of Georgia, and a person qualified to vote in primary and general elections in Fulton County (R. 1–3). The defendants (appellants here) were the Chairman and Secretary of the Georgia State Democratic Executive Committee and the Secretary of the State of Georgia in their representative capacities; the Georgia State Democratic Executive Committee; and the Georgia State Democratic Party (R. 2–3). The complaint asserted rights under 42 U.S.C. 1983 (which provides for suits in equity or other proper proceedings to redress deprivations of federal constitutional rights under color of state authority) and claimed that the district court had jurisdiction under 28 U.S.C. 1343 (R. 1).

The complaint alleged that the defendant Democratic Party was planning to hold a statewide primary election in Georgia on September 12, 1962, for nomination of candidates for the United States Senate and the state offices of Governor, Lieutenant Gov-

ernor, Secretary of State, Justice of the Supreme Court, Judge of the Court of Appeals, Attorney General, Comptroller General, Commissioner of Labor, and Treasurer (R. 4). It was further stated that the method of tabulating the votes to be cast in the September 12, 1962, election—the so-called county unit system—had been enacted in the Neill Primary Act of 1917 (Georgia Laws 1917, pp. 183–189, codified as Ga. Code Ann. 34–3212 to 34–3218). The Act *required*, as to statewide primaries conducted by any political party, that:

> Candidates for nominations to above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis, that is to say, two votes for each representative to which such county is entitled in the lower House of the General Assembly. * * *
>
> * * * the majority of the county unit vote shall be the determining factor for the nomination of United States Senator and Governor and * * * the plurality of the county unit vote shall be the determining factor for the nomination to all other offices named in [Section 34–3212].

The complaint noted that Article III, Section III, paragraph I, of the Georgia Constitution of 1945 established the composition of the lower House of the General Assembly as follows (R. 6):

> The House of Representatives shall consist of representatives apportioned among the several

> counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.

Appellee asserted that the total population of Georgia in 1960 was 3,943,116; that the population of Fulton County, where he resided, was 556,326; that the residents of Fulton County comprised 14.11 percent of Georgia's total population (R. 6); but that, under the county unit system, the six unit votes of Fulton County constituted 1.46 percent of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population (R. 7). The complaint further alleged that Echols County, the least populous county in Georgia, had a population in 1960 of 1,876, or .05 percent of the State's population, but the unit vote of Echols County was .48 percent of the total unit vote of all counties in Georgia, or ten times Echols County's statewide percentage of population (R. 7). One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County (R. 7).

The complaint urged that the provisions of Sections 34–3212 to 34–3218 of the Georgia Code, governing the counting, tabulation, and consolidation of votes cast in primary elections on the county unit basis, and requiring the certification and publication of the

names of persons deemed nominees on the basis of the county unit system, violated the equal protection and due process clauses of the Fourteenth Amendment and, insofar as they relate to the election of United States Senators, the Seventeenth Amendment (R. 10–11). More specifically, the complaint alleged that the county unit system deprived the complainant of equal protection by virtue of the disparity it created between the weight and influence of the vote of appellee, as a resident of Fulton County, and the votes of others throughout Georgia (R. 10). It asserted that Sections 34–3212 to 34–3218 created "arbitrary and unconstitutional classifications among voters of the State based solely upon geographic location of residents and character of domicile (*i.e.*, urban or rural) * * *" (R. 11). The complaint further stated that the due process clause was violated because "the dilution, diminution and abridgement of, plaintiff's vote and of his right to vote constitut[ed] deprivation of plaintiff's liberty and property * * *" (R. 11). The election of Senators by the county unit system, the complaint said, violated the Seventeenth Amendment guaranty that Senators from each State shall be "elected by the people thereof" (R. 11).

Appellee claimed further that he was without adequate remedy at law, inasmuch as the Supreme Court of Georgia, in *Cox* v. *Peters*, 208 Ga. 498, 67 S.E. 2d 579, appeal dismissed, 342 U.S. 936, had held that an action for damages would not lie in favor of one aggrieved by reason of the county unit system (R. 12). He prayed that a three-judge court be con-

vened (R. 13), and that the court issue a declaratory judgment holding Sections 34–3212 to 34–3218 unconstitutional insofar as they provided for the nomination by the defendant Democratic Party of any candidate for United States Senator or statewide office under the county unit system (R. 14). The complaint went on to request that the Democratic Party, the Chairman and Secretary of the Georgia State Democratic Executive Committee, and their successors in office, be restrained (1) from conducting elections under the county unit system; (2) from tabulating and consolidating ballots cast in the Democratic primary election to be held on September 12, 1962, and in any other primary election conducted by that Party on the basis of that system; (3) from selecting any nominee on the basis of ballots cast in any primary election held in accordance with that system; (4) from publishing or certifying the nomination of any candidate for United States Senator or other statewide office so selected; and (5) from giving any force and effect to the county unit system as it was established under the Neill Primary Act (R. 13). Finally, appellee asked that the Secretary of the State of Georgia, and his successors in office, be restrained from certifying to the several ordinaries of the State of Georgia the names of any candidates for nomination to statewide office who might be nominated in any primary held by the Democratic Party under the county unit system, and from furnishing to the several ordinaries official ballots and election supplies which recognized nomination under the county unit system (R. 13–14).

On April 2, 1962, a three-judge court was convened, consisting of Chief Judge Tuttle and Judge Bell of the Court of Appeals for the Fifth Circuit, and Judge Hooper, District Judge for the Northern District of Georgia (R. 39). On April 25, 1962, appellants moved to dismiss the complaint. Together with their motion to dismiss, appellants filed an answer in which they denied that the challenged statutes were "arbitrary, discriminatory or unconstitutional for any reason" (R. 67). The answer set forth a history of the county unit system (R. 69–72),[3] and stated that "the county unit method of nominating candidates in primary elections is reasonably designed to give recognition to the pattern of state organization on a county unit basis, and to achieve a reasonable balance as between urban and rural electoral power" (R. 73).

At the hearing before the three-judge court upon appellee's application for an interlocutory injunction, appellee introduced several affidavits.[4] One of these was executed by James C. Bonner, Professor of History at the Woman's College of Milledgeville, Georgia, who recounted the history of the Georgia county unit system. He detailed the population growth of Atlanta, which had received no corresponding adjustment in unit votes (R. 104), the steady growth in disparity of voting strength as between the most and

---

[3] In Appendix B to this brief (pp. 72–80), we describe the history of the present county unit system and of the litigation involving it.

[4] Appellants introduced no testimony and but a single exhibit: a tabulation of the returns of the 1960 general election (R. 179).

least populous counties (R. 113), and the relationship of the county unit system to rural antagonism toward urban centers. He noted that there had been one instance in Georgia where a candidate had won the Democratic Party's gubernatorial nomination by the county unit vote although he did not receive a majority of the popular vote (R. 111, 113).

The affidavit of former Mayor William B. Hartsfield of Atlanta described how the county unit system discouraged citizens in populous counties from participating in nominations for statewide offices; how it reduced the opportunity of citizens of Fulton County to obtain such nominations; and how candidates were encouraged to vilify the major population centers in order to gain unit votes in the less populous counties (R. 122–126).

An affidavit of Phillip Hammer, an economist concerned with the economics of urban and metropolitan area growth, stated that the county unit system produced a sharp disparity in Georgia between political control and relative economic development since the heavily populated and growing counties received a disproportionately small proportion of the unit votes (R. 155–159).

Two affidavits of Leslie J. Gaylord, assistant professor of mathematics at Agnes Scott College, Decatur, Georgia (R. 84–89, 126–131), discussed a so-called "547 unit proposal" then under consideration by the Georgia legislature (R. 127).[8] One of these

[8] This proposal was subsequently enacted by the legislature, and then held unconstitutional by the three-judge district court in the decision under review here see *infra*, pp. 13–16.

showed that, under the 547-unit proposal, a majority (50.4 percent) of the population of voting age would have only 31.1 percent of the total units (R. 128), and that, in a two-man race, 15.4 percent of the voters could elect a candidate, in a three-man race, 10.2 percent, in a four-man race, 7.7 percent, and in a five-man race, 6.1 percent (R. 128).[6]

On the same day as the hearing, April 27, 1962, the Georgia legislature enacted, and the Governor approved, an amendment to the statutes challenged by the complaint (Ga. Laws, 1962 Ex. Sess., p. 1217); see Appendix A, infra pp. 65–19. The amendment—the 547 unit vote proposal—modified the county unit system by alocating units to counties in accordance with a "bracket system" instead of doubling the number of representatives of each county in the lower house of the Georgia Assembly. Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 person; an additional unit for the next 10,000 persons; another unit for the next 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons. Under the 1962 Act, a candidate in order to receive a county's unit votes is required to receive a majority of the popular votes in the county, not just a plurality; all candidates for statewide

[6] Several of the affidavits filed by appellee noted that there was a relationship between the county unit system and Negro disfranchisement, *i.e.*, that Negro registration was generally low in those areas where the county unit system accorded relatively high voting power, and high in areas where the vote counted for less (R. 85; see also R. 91–92).

office (not merely for Senator and Governor as under the Neill Primary Act) are required to receive a majority of the county unit votes to be entitled to nomination in the first primary. In addition, in order to be elected in the first primary, a candidate has to receive a majority of the popular votes. If no candidate receives both a majority of the unit votes and a majority of the popular votes, a second run-off primary is required between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes. In the second primary, the candidate receiving the highest number of unit votes is to prevail.

On the same day as the 1962 Act was passed, appellee filed a motion to amend his complaint, which was immediately granted in open court (R. 79). As amended, the complaint alleged that the 1962 Act violated "the Fourteenth and Seventeenth Amendments to the Constitution of the United States in the manner previously set forth" in the original complaint (R. 80). It prayed that the court declare the Neill Primary Act, as amended on April 27, 1962, unconstitutional insofar as it provided for the nomination by the Democratic Party of any candidate for United States Senator or other statewide office under any "County Unit" or "Geographical Unit" system whereby individual votes cast were consolidated by geographical groupings and assigned values other than one unit for each popular vote cast. The amended complaint requested injunctive relief restraining the conduct of the September 12, 1962, pri-

mary, and "any primary election hereafter conducted" by the Democratic Party, on any basis other than by popular vote whereby each individual vote cast was given equal weight with every other vote cast (R. 79–81).

2. *The Decision of the District Court.*—On April 28, 1962, the district court, relying on *Baker* v. *Carr*, 369 U.S. 186, held that it had jurisdiction; that a justiciable cause of action was stated; and that appellee had standing to maintain the suit (R. 195–198). The court cited *Chapman* v. *King*, 154 F. 2d 460 (C.A. 5), certiorari denied, 327 U.S. 800, for the proposition that the Democratic primary in Georgia is state action, and therefore concluded that the Fourteenth Amendment extends to a deprivation of equal protection occurring in such an election (R. 196–197). Stressing the point that it was ruling on an application for a temporary injunction, the court said that it was necessary to rule on the injunction before a final hearing on the merits could be held because time was of the essence (R. 198).

The court then considered the question whether the Neill Primary Act, as amended, violated appellee's right to equal protection of the laws. It reasoned that the claim of "invidious discrimination" was to be adjudicated in the light of all "relevant factors" (R. 199), including (1) the "rationality of state policy"; (2) whether or not the system was arbitrary; and (3) whether or not the system had "a historical basis in our political institutions, both federal and state" (R. 199–200). In addition, the court said that, at

least in determining whether it should intervene, consideration should be given to the presence or absence of a political remedy and the delicate relationship between the federal and state governments under the Constitution (R. 201).[7]

Applying these criteria, the court concluded that a county unit system, as such, did not violate the federal Constitution, "assuming rationality and absence of arbitrariness in end result" (R. 201). Nonetheless, the court found that Georgia's system did violate the equal protection clause (R. 201–202):

> The system as it existed prior to yesterday was violative of the right of plaintiff to the equal protection of the laws. The system as it exists today is an improvement * * *. But even the new system misses the mark in two respects: first in failing to accord the unit of plaintiff a reasonable proportion of the whole, and second in failing to accord the units representing a majority of the population a reasonable proportion of the whole.[8]

---

[7] The court concluded that there was no likelihood that the appellee could obtain relief through a political remedy (R. 201).

[8] In support of this conclusion, the court included a table covering the four most populous and least populous counties of Georgia (R. 202):

"County number	Name	Population	Number unit votes	Population per unit vote	Ratio to Fulton County
1	Fulton	556, 326	40	13, 908	.....
2	DeKalb	256, 782	20	12, 839	.....
3	Chatham	188, 299	16	11, 760	.....
4	Muscogee	158, 623	14	11, 330	.....
156	Webster	3, 247	2	1, 623	8 to 1
157	Glascock	2, 672	2	1, 336	10 to 1
158	Quitman	2, 432	2	1, 216	11 to 1
159	Echols	1, 876	2	938	14 to 1

"There are 97 two-unit counties, totalling 194 unit votes, and

The court also laid down the following standard for determining the validity of a county unit system (R. 202–203):

> [A] unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the whole vote for electors of the party in a recent presidential election; provided no discrimination is deemed to be invidious under the system if the disparity against any county is not in excess of the disparity that exists against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress, and provided it is adjusted to accord with changes in the basis at least once in each ten years.

Its interlocutory injunction enjoins the appellants, until further order of the court, from applying the county unit system, pursuant either to a state statute or party rule, if the allocation of units fails to meet the prescribed standard (R. 204–205).

---

22 counties totalling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives counties having population of one-third of the total in the state a clear majority of county units."

The jurisdiction of the district court, the justiciability of the issues, and appellee's standing to maintain the action are all established by the decision in *Baker* v. *Carr,* 369 U.S. 186. It is also plain that the action of the district court was not premature. Accordingly, the case brings before the Court, for the first time on the merits, this question: What substantive limitations, if any, does the Fourteenth Amendment place upon the electoral processes of the States? More precisely, the issue is whether an electoral system that systematically and severely discriminates against voters in populous counties in the selection of statewide officials violates the equal protection or due process clauses of the Fourteenth Amendment.

The right to be free from hostile or capricious discrimination in defining the class of persons entitled to vote is now well-established. The same safeguards should be held to protect the qualified voter against hostile or capricious dilution of the value of his franchise. The need for protection against fundamental unfairness in the electoral process is at least as great as in dealing with regulatory legislation and criminal laws. Nor is the process of adjudication more difficult. The problems lend themselves to rational analysis. Those who demand precise standards for exact mathematical measurement of every electoral system or method of apportionment forget that neither the equal protection nor due process clause has ever been reduced to a mechanical yardstick. The answers must be found in case-by-case adjudication based upon constitutional practice, history, analogy to past adjudi-

cations, and an appreciation of the long-range ideals at the base of our civil and political institutions. By way of illustration and without seeking to foresee other questions, we suggest two principles that would condemn many flagrant injustices.

First, any apportionment or electoral system which produces utterly capricious divergencies in voting power, defying any intelligible explanation, violates the Fourteenth Amendment. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 251, 258 (Mr. Justice Clark concurring); *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand).

Second, any apportionment or electoral system that imposes an extreme and invidious discrimination against a particular class of voters, without any objective or justification which is relevant to the purposes of the legislative or electoral process, also violates the equal protection and due process clauses of the Fourteenth Amendment. Cf., *Gomillion* v. *Lightfoot*, 364 U.S. 339.

The latter principle is applicable to the present case. Unlike the crazy-quilt that may result when an apportionment is left unchanged for decades, the 1962 Georgia statute proceeds upon an intelligible plan—it systematically and grossly discriminates against voters in the larger and more populous counties in the election of statewide officials. The unit voting plan permits the voters of rural counties containing less than one third of the people of Georgia to determine the election of the Governor, Senators, and other statewide officials. The votes of citizens in the eleven smallest counties are accorded, on the average, seven

and one-half times the weight of votes in the four largest counties.

This gross and systematic discrimination against urban and suburban voters cannot be justified as a measure reasonably adapted to carrying out a permissible objective of the State's electoral process. A man's residence or the number of his neighbors bears no more relation to his entitlement to vote than his wealth bears to his right to a fair appeal from a criminal conviction (see *Griffin* v. *Illinois*, 351 U.S. 12) or his race to his right to public education (see *Brown* v. *Board of Education*, 347 U.S. 483). The egregious dilution of urban and suburban votes in a statewide election is unnecessary to secure geographical distribution or to reflect the political integrity of historic governmental subdivisions.

Appellants seek to justify the preferential treatment of the rural minority—or, to put it another way, the hostile discrimination against the urban and suburban majority—on the ground that urban voters have more favorable opportunities for concerted group action and tend to regiment their power along the lines of group interests. A sufficient answer is that there is not the slightest evidence to support these factual assumptions. The fundamental answer is that our basic democratic ideals forbid the notion that any particular "community of interest" should be accorded greater voting strength than the number of the people comprising the community warrants. This is true whether the favored group be a rural minority, members of labor unions, businessmen, Catholics, Negroes, elderly persons, or suburbanites. If the State has

power arbitrarily to enhance the voting power of one group, it has equal power to repress the same group or any other. Such measures, we submit, are the very essence of the arbitrariness that both equal protection and due process prohibit.

In the concluding sections of this brief, we show that the foregoing principles apply to the use of Georgia's county unit system in the Democratic primary even though it be conducted according to party rules instead of statutes. We then suggest that the Court should delete those portions of the decree below which in effect give advice as to the kinds of unit systems that the Constitution permits and prohibits. Adjudication of the constitutionality of any state statute or party rule, other than those now before the Court, should await the action of the state authorities.

ARGUMENT

I

THE CONSTITUTIONAL ISSUES ARE PROPERLY BEFORE THE COURT FOR DECISION ON THE MERITS

A. THE DISTRICT COURT HAD JURISDICTION OF THE SUBJECT MATTER

Section 1343 of Title 28 U.S.C. provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *." Section 1983 of Title 42 U.S.C. provides that "[e]very person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In *Baker* v. *Carr*, 369 U.S. 186, the complaint alleged that malapportionment of seats in the Tennessee legislature deprived the plaintiffs—citizens residing in areas alleged to be underrepresented—of equal protection of the laws and due process under the Fourteenth Amendment. This Court held that such an allegation provided the necessary basis for federal jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983.

In this case, the plaintiff likewise brought suit under 28 U.S.C. 1343 and 42 U.S.C. 1983. He alleged that the Georgia county unit system violates the equal protection and due process clauses of the Fourteenth Amendment because of the disparity which it creates between the weight and influence of the plaintiff's vote and the weight and influence of the votes of others in Georgia. Thus, the claim in this case closely resembles the claim for relief involved in *Baker* v. *Carr*. The difference between a Fourteenth Amendment claim arising out of the malapportionment of seats in a legislative body and claims of denial of equal protection and due process based on the improper weighting of votes in the election of statewide officials is plainly immaterial for purposes of subject-matter jurisdiction.

We discuss below (pp. 26–61) our contention that the Georgia county unit system is unconstitutional. It is sufficient at this point to say that this discussion shows clearly that the issue is not "so patently without merit as to justify * * * dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 683; see *Hart* v. *Keith Vaudeville Exchange*, 262 U.S. 271, 274; *Newburyport Water Co.* v. *Newburyport*, 193 U.S. 561, 579. Indeed, the substantiality of the issue in this case is also demonstrated by the determination in *Baker* v. *Carr* that the issue there was not "unsubstantial and frivolous." 369 U.S. at 199. If the claim in *Baker* v. *Carr* was not so insubstantial as to warrant dismissal for lack of jurisdiction, the same is surely the case here.[9]

B. THE CONTROVERSY IS JUSTICIABLE

In *Baker* v. *Carr*, the Court rejected the contention that the voter's claim under the Fourteenth Amendment presented a non-justiciable "political question." 369 U.S. at 209. The Court found that malapportionment cases do not share characteristics involved in cases presenting non-justiciable "political questions"—for example, questions concerning our foreign

[9] That the Fourteenth and Seventeenth Amendment claims are substantial enough to withstand dismissal for lack of jurisdiction is also indicated by the fact that in *South* v. *Peters*, 339 U.S. 276, 277, Justices Black and Douglas, who alone considered the merits, stated that the Georgia county unit system violated these constitutional provisions. See also the dissenting opinion of Judge Andrews in *South* v. *Peters*, 89 F. Supp. 672, 683 (N.D. Ga.). Cf. *Gates* v. *Lore*, 172 Tenn. 471, 113 S.W. 2d 388.

relations, those to be decided by a political branch co-equal with the judiciary, and those for which judicially manageable standards are lacking. Instead, the Court said that "Judicial standards under the Equal Protection Clause are well developed and familiar." 369 U.S. at 226. Since the issues in this case are closely similar to those in *Baker* v. *Carr*, the claim here is also justiciable. Moreover, insofar as this case involves elections for United States Senator, this Court noted in *Baker* v. *Carr* that previous decisions had "settled the issue in favor of justiciability of questions of congressional redistricting." 369 U.S. at 232.[10]

C. APPELLEES HAVE STANDING TO MAINTAIN THE ACTION

Baker v. *Carr* also demonstrates that appellee has standing to maintain this suit. Appellee has alleged that he is a citizen of the United States and Georgia and is a resident of Fulton County; that he is a mem-

[10] The Court cited *Smiley* v. *Holm*, 285 U.S. 355, *Koenig* v. *Flynn*, 285 U.S. 375, and *Carroll* v. *Becker*, 285 U.S. 380. The Court pointed out that *Colegrove* v. *Green*, 328 U.S. 549, was not to the contrary, for "the refusal to award relief in *Colegrove* resulted only from the controlling view of a want of equity." 369 U.S. at 234. The "controlling view" in *Colegrove* was that of Mr. Justice Rutledge, who voted to affirm the dismissal of the complaint despite his conclusion that a justiciable issue was presented. He stated that "The shortness of the time remaining [before the forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. * * * I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause." 328 U.S. at 565–566.

ber of the Democratic Party of Georgia; that he is qualified to vote in primary and general elections in Fulton County (R. 2, 3); and that he is injured by the disparity which the county unit system creates between the weight and influence of his vote, as a resident of Fulton County, and the votes of other residents throughout Georgia (R. 10). Here, as in *Baker* v. *Carr*, the injury which appellee asserts is that the State discriminates against the voters in the county in which he resides, "placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties." 369 U.S. at 207–208. Appellee, like the appellants in *Baker* v. *Carr*, has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." 369 U.S. at 204. See also *Colegrove* v. *Green*, 328 U.S. 549; *South* v. *Peters*, 339 U.S. 276; *Smiley* v. *Holm*, 285 U.S. 355, 361; *Koenig* v. *Flynn*, 285 U.S. 375, 379; *Wood* v. *Broom*, 287 U.S. 1, 4; *Coleman* v. *Miller*, 307 U.S. 433, 438.

D. THE DISTRICT COURT'S RULING WAS NOT PREMATURE

Although the original complaint in this action attacked the validity of the Neill Primary Act of 1917, during the course of the hearing before the three-judge court the state legislature amended that Act. The complaint was accordingly amended to seek relief against the new statute, and the district court ultimately declared invalid and enjoined the enforcement

of the 1962 amendment.[11] Appellants argue (Br. 52–53) that, upon being advised of the enactment of the 1962 amendment, the district court should have dismissed the complaint on the ground that the constitutionality of legislation should not be determined in advance of its adverse effect in a concrete case. They note that, as a matter of fact, the results of the 1962 primary—conducted on a popular vote basis because of the district court's decision in this case—would have been the same under the 1962 Act. Thus, appellants are apparently contending that appellee could challenge the 1962 Act only after the 1962 election had occurred.

There can be no doubt that a genuine controversy was presented in this case. If the district court had not acted, the 1962 primary elections would have been conducted by the Democratic Party on a basis which appellee contends, and the district court held, deprived appellee of his constitutional rights. Moreover, if the district court could not properly act, as appellants argue, the constitutionality of conducting the 1962 primary under the 1962 amendment could never have been challenged. A complaint attacking the application of a county unit system to a primary election which is filed after the election is held, is subject to dismissal for want of equity. See, *e.g.*, *Turman* v. *Duckworth*, 68 F. Supp. 744 (N.D. Ga.), appeal dismissed, 329 U.S. 675; *Cook* v. *Fortson*, 68 F. Supp. 624 (N.D. Ga.),

[11] Although the Act which the court invalidated was enacted on the day preceding the decision, the passage of the Act had been anticipated, and, indeed, had been the subject of affidavits and exhibits filed by appellee (see R. 84–89, 126–131, 143).

appeal dismissed, 329 U.S. 675. Surely, it was not premature for the district court to decide the case when this was the only way that appellee could be protected against irreparable harm.

On the other hand, as appellants concede (Br. 11), this case is not rendered moot by the fact that the State Democratic Committee, on June 27, 1962, voted to hold the September 12, 1962, primary on a popular vote basis. *New York Times*, June 28, 1962, p. 29. The Democratic Committee was able to act as it did only because of the district court decree invalidating the 1962 Act and thus relieving the Democratic Committee of the obligation of conducting the primary pursuant to that Act. If the case were remanded for dismissal of the complaint as moot, the Party would be compelled to follow, in future elections, the procedures prescribed by the 1962 Act, which would remain valid. See *United States* v. *Munsingwear*, 340 U.S. 36, 39. Moreover, the amended complaint requested, and the district court's decree granted, relief enjoining the Democratic Party from holding any primary election on the basis of a county unit system unless it met standards far stricter than the 1962 Act or the Party's own rules. The abandonment of the practices complained of for one election, particularly under compulsion of a court decree, does not render moot the question of the validity of such practices as applied to future elections. See *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632–633; *Carpenters Union* v. *Labor Board*, 341 U.S. 707–715.

II

THE EXTREME AND INVIDIOUS DISCRIMINATION AGAINST VOTERS IN POPULOUS DISTRICTS UNDER GEORGIA'S COUNTY UNIT SYSTEM FOR CHOOSING CANDIDATES FOR STATEWIDE OFFICE VIOLATES THE FOURTEENTH AMENDMENT

Preliminarily, we point out that the Court has never ruled upon the constitutionality of Georgia's county unit system as applied to either elections or legislative representation. *South* v. *Peters*, 339 U.S. 276, was not, contrary to appellants' position, a ruling on the merits. The case involved a predecessor of the county unit system involved in this case, which was even more discriminatory against voters in populous counties. The Court's ruling was embodied in a single sentence (339 U.S. at 277): "Federal courts consistently *refuse to exercise their equity powers* in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (emphasis added). It is clear, therefore, that this Court did not consider the constitutional merits of the Georgia county unit system but merely concluded that the case was not a proper one for the exercise of judicial power.[11] As the Court said in *Baker* v. *Carr*, 369 U.S. at 235: "*South* v. *Peters*, 339 U.S. 276, like *Colegrove* appears to be a refusal to exercise equity's powers * * *." Just as the refusal of the Court to exercise its equitable discretion

[11] The dissenting opinion of Mr. Justice Douglas, joined by Mr. Justice Black, did reach the merits and concluded that the Georgia county unit system was unconstitutional.

in *South* v. *Peters* was not dispositive of *Baker* v. *Carr*, it is not dispositive of the merits of this case.

Nor are the other cases involving the county unit system which have reached this Court controlling. In *Cook* v. *Fortson*, 329 U.S. 675, and *Turman* v. *Duckworth*, 329 U.S. 675, the Court dismissed the bills as moot. As the Court noted in *Baker* v. *Carr*, 369 U.S. at 235, problems of timing were critical in *Hartsfield* v. *Sloan*, 357 U.S. 916, where the Court denied mandamus in an action seeking to compel the convening of a three-judge court. Finally, the Court in *Cox* v. *Peters*, 342 U.S. 936, dismissed for want of a substantial federal question an appeal from a holding of a state court that primary elections involved no state action. 208 Ga. 498, 67 S.E. 2d 579. This determination has since lost its vitality, for in *Terry* v. *Adams*, 345 U.S. 461, this Court held that primary elections constitute state action and are therefore covered by the Fourteenth Amendment (see *infra*, pp. 58–59, and *Baker* v. *Carr*, 369 U.S. at 235).[13]

A. THE RIGHT OF A QUALIFIED VOTER TO BE FREE FROM A CAPRICIOUS OR UNREASONABLY DISCRIMINATORY DILUTION OF THE VALUE OF THE FRANCHISE IS SECURED BY THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT

Although *Baker* v. *Carr*, 369 U.S. 186, left open the question whether the Fourteenth Amendment imposes any substantive restrictions upon the power of a State to dilute the value of the franchise of qualified voters, the state and lower federal courts unani-

[13] For a detailed history of the litigation involving the Georgia county unit system, see Appendix B, *infra*, pp. 77–80.

mously agree that arbitrary and capricious discrimination violates both the equal protection and due process clauses of the Fourteenth Amendment. *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Simms*, No. 508, this Term; *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo); *Sobel* v. *Adams*, 208 F. Supp. 316 (S.D. Fla.); *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga.); *Toombs* v. *Fortson*, N.D. Ga., decided September 5, 1962; *W.M.C.A., Inc.* v. *Simon*, 208 F. Supp. 368 (S.D. N.Y.), pending on appeal, No. 460, this Term; *Moss* v. *Burkhart*, 207 F. Supp. 885 (W.D. Okla.); *Mann* v. *Davis*, E.D. Va., decided November 28, 1962; *Wisconsin* v. *Zimmerman*, 209 F. Supp. 183 (W.D. Wis.); *Caesar* v. *Williams*, 371 P. 2d 241 (Idaho Sup. Ct.), petition for rehearing denied, 371 P. 2d 255; *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, pending on appeal, No. 554, this Term; *Scholle* v. *Hare*, 367 Mich. 176, 116 N.W. 2d 350 (majority opinion and Justice Souris concurring), pending on appeal *sub. nom. Beadle* v. *Scholle*, No. 517, this Term); *Levitt* v. *Maynard*, 182 A. 2d 897 (N.H. Sup. Ct.); *Sweeney* v. *Notte*, 183 A. 2d 296 (R.I. Sup. Ct.); *Harris* v. *Shanahan*, District Court, Shawnee County, Kansas, decided May 31, 1962; *Harris* v. *Shanahan*, District Court, Shawnee County, Kansas, decided July 26, 1952; *Fortner* v. *Barnett*, No. 59,965, Chancery Court of the First Judicial District of Hinds County, Mississippi. See also *Asbury Park Press, Inc.* v. *Wooley*, 33 N.J. 1, 161 A. 2d 705.

We submit that this widespread acceptance of the view that the Fourteenth Amendment has substantive content as applied to the electoral process is plainly correct.

It is settled law that discrimination against voters on the basis of race violates the equal protection clause of the Fourteenth Amendment. *E.g., Nixon* v. *Herndon,* 273 U.S. 536; *Nixon* v. *Condon,* 286 U.S. 73; *Gomillion* v. *Lightfoot,* 364 U.S. 339. And, ever since the *Granger* cases (*Munn* v. *Illinois,* 94 U.S. 113), it has been clear that the constitutional guarantee is not confined to discrimination based on color, but extends to arbitrary and capricious action against other groups. Thus, it would obviously violate the equal protection clause for a State to deny the franchise to persons who had attended college or to women who bobbed their hair.

A geographical classification may likewise be so irrational as to violate the equal protection clause. No one would defend the constitutionality of giving one twenty-fifth of a vote to citizens in the eastern half of the State and one vote to those in the western half. The effect would be the same if a statute gave one vote in an electoral body to each of the populous counties in the eastern half and twenty-five votes to each of the sparsely populated counties in the west. Other statutes which arbitrarily provide equally disproportionate voting upon a geographical basis must be equally unconstitutional.

In other words, the Constitution does not distinguish between the denial of voting rights and the gross distortion of their weight, at least in the elec-

tion of a Governor, Senator, or other statewide official. This is no novel doctrine. In *United States* v. *Classic,* 313 U.S. 299, this Court held that a qualified voter had a constitutional right to have his vote counted in a primary election for the House of Representatives without dilution by fraudulent tabulation. Similarly, in *United States* v. *Saylor,* 322 U.S. 385, the Court ruled that a qualified voter had a constitutional right to have his vote counted in the election of a Senator without dilution by the stuffing of ballot boxes. In both cases, the essence of the wrong was the improper dilution of votes. Systematic legislative dilution based upon irrelevant circumstances is no less a violation of the basic guaranty. Cf. *Baker* v. *Carr,* 369 U.S. 186, 226. Mr. Justice Frankfurter appears to have acknowledged the principle in his dissenting opinion in *Baker* v. *Carr,* 369 U.S. at 300, where he distinguished between asking the Court to choose "among competing bases of representation" and "a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote."

These illustrations exemplify, we believe, the acceptance of the principle that the Fourteenth Amendment imposes some general restrictions upon the power of a State to practice capricious or invidious discrimination in withholding the franchise or diluting citizens' votes. If a State may not resort to unreasonable and arbitrary classification in enacting legislation affecting the right of defendants to appeal or regulating economic and social interests, certainly

it may not constitutionally engage in capricious or invidious discrimination among citizens seeking to exercise the fundamental right to vote. For the right to vote goes to the heart of democratic government. In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question "whether legislation which restricts those political processes which can be ordinarily expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School District* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.

Arbitrary regulation of the right to vote, even more than restrictions upon freedom of communication, destroys the essential pre-conditions of alert democracy.[14] Those who are denied the right to vote

[14] The record in this case amply demonstrates that arbitrary regulation of the franchise vitiates the essential pre-conditions of democracy. Speaking of the county unit system as it had

or accorded a vote which is greatly diluted in strength cannot protect their franchise by voting. There is, therefore, special reason for the courts to exert their constitutional powers to vindicate those constitutional rights.

Once the general principle is established, the question becomes, by what standards should a State's action be judged. In approaching this critical question at least one putatively important distinction should be kept in mind—the difference between legislative apportionment and the election of a Governor, Senator, or other official holding statewide office. Since a legislature is representative, there may be room for choice among theories of representation—such as representation according to population, or towns or counties, or contribution to the cost of government—as long as there is no more than a modest departure from *per capita* equality. Within whatever unit of representation is established, however, each citizen casts an equal vote for his representatives. Criteria similar to those relating to the legislature may per-

---

existed prior to the 1962 amendment, William B. Hartsfield, the Mayor of Atlanta for twenty-four years, stated in an affidavit filed in this case that "potential voters, for example in the County of Fulton, knowing that their ballots cast in Fulton County are debased, frequently take the attitude that there is no use in registering and voting in primaries for state-wide offices"; that "the citizens of Fulton and other counties in which metropolitan centers are located in the State of Georgia [had] as a result of their residence, very little chance for nomination in state-wide primaries"; and that, for the purpose of gaining the unit votes of the smaller counties, candidates had subjected the citizens of Atlanta to vilification and abuse (R. 123, 125).

haps apply when a statewide official is not elected by direct voting but by a representative body, as was the early practice in the election of Governors in some States and the uniform practice in the election of United States Senators prior to the Seventeenth Amendment. In the direct election of statewide officials, however, the decision is made by voters, not by representatives, and there is no occasion for choosing between conflicting theories of representation. The elected official is chosen to represent all the citizens. The introduction of any unit system that weights the votes of the counties otherwise than by population becomes simply a method of diluting the value of some votes in favor of others.

The starting place in adjudicating the constitutionality of any legislative apportionment, and *a fortiori* of any electoral system, must be *per capita* equality of voting power. Political equality is one of the fundamental ideals of American life. Any serious departure from apportionment according to population (whether persons or qualified voters)—certainly any departure affecting the election of a statewide official—is subject to question, even if the divergence may ultimately be shown to have a rational justification.[15] The extent to which the right of equal representation is ingrained in our constitutional system is evidenced by the fact that more than four-

[15] Since exact numerical equality of population within legislative districts is impossible to achieve, all that the principle requires, in that context, is "that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest." *Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869.

fifths of the state constitutions make apportionment according to population or qualified voters the basic principle for choosing at least one branch of the state legislature. Forty-seven States out of fifty grant numerical equality in the election of statewide officials. Only Mississippi and Maryland follow a unit system like Georgia's, and even in those cases there is no reason to believe that discrepancies from equality of voting is the result of systematic discrimination. While the President and Vice-President are chosen by an electoral college, we submit that it is not analogous to the electoral systems of the States and, moreover, it only modestly departs from *per capita* representation. See *infra*, p. 46.

Because the case does not present the issue, we pass the question whether the equal protection clause prohibits any discrimination in the electoral process, and possibly even in legislative representation. See *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.); Larson, *Reapportionment and the Courts* (1962); Twentieth Century Fund, *One Man—One Vote, A Statement of Basic Principles of Legislative Apportionment* 1962).[16] At the very least, the

[16] We are not unmindful of the warning in *MacDougall* v. *Green*, 335 U.S. 281, 283, that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." The Court there, in upholding a state statute requiring that nominees on the ticket of a new political party receive 200 signatures from 50 of the 102 counties, said that it was "allowable State policy to require that candidates for state-wide office should have support not limited to a concentrated locality." But this does not mean that, as in Georgia, the actual votes can be given different weight. See also *infra*, p. 47.

principle of equality incorporated in the equal protection clause means that the point of departure must be equal, or substantially equal, treatment of all voters. "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting). Once it appears that persons similarly circumstanced have been denied equality of voting rights the statute stands condemned unless the differentiation has a relevant and substantial justification.

There is no contradiction between this proposition and the settled rule that the burden of establishing the unconstitutionality of a statute rests upon him who assails it. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 584; see *Baker* v. *Carr*, 369 U.S. 186, 266 (Justice Stewart concurring). The complainant must show that he is indeed the victim of discrimination and that the only apparent bases for differentiation are invidious or capricious, but having gone so far, he is not compelled to demonstrate the absence of any imaginable foundation. "Discriminations are not to be supported by mere fanciful conjecture." *Hartford Steam Boiler Ins. Co.* v. *Harrison*, 301 U.S. 459, 462; *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 209. In the present context, a substantial departure from equality of treatment, without evident foundation, makes out at least a *prima facie* case of unconstitutional discrimination sufficient to require the State to call attention to some justification for the disparities. See *Moss* v. *Burk-*

hart, 207 F. Supp. 885, 891 (W.D. Okla.); *Lisco* v. *McNichols*, 208 F. Supp. 471, 477–478 (D. Colo.).

The usual standard for judging the constitutionality of legislative classifications is whether the differentiation is arbitrary and unreasonable. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Lindsley* v. *Natural Carbonic Co.*, 220 U.S. 61, 78–79; *McGowan* v. *Maryland*, 366 U.S. 420, 425–426; *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385; *Morey* v. *Doud*, 354 U.S. 457, 463, 464. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466. A State "cannot play favorites * * * without rhyme or reason." *Ibid.* Nor is it sufficient, at least as to legislation affecting personal liberty, that a classification may have an intelligible foundation. In *Griffin* v. *Illinois*, 351 U.S. 12, where the State required all criminal defendants, including indigents, to pay the cost of transcripts which were often necessary to take full advantage of the right of appeal, this Court held that the result was arbitrary discrimination against the poor. Similarly, in *Brown* v. *Board of Education*, 347 U.S. 483, the Court held that a state system of separate-but-equal schools violated the equal protection clause. The criterion is not only whether the differentiation between persons or groups of persons has an intelligible basis, but whether that classification can reasonably be found adapted to some permissible social, economic, political, or moral objective of state policy.

The due process clause [17] incorporates similar standards. "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied * * *." *Nebbia* v. *New York*, 291 U.S. 502, 537. In *Palko* v. *Connecticut*, 302 U.S. 319, Mr. Justice Cardozo described "due process" in terms to which the Court has repeatedly adverted: it protects rights "found to be implicit in the concept of ordered liberty" (*id.* at 325); which, if abolished, would "violate a 'principle of practice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 105) (302 U.S. at 325); and which "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (*Hebert* v. *Louisiana*, 272 U.S. 312, 316) (302 U.S. at 328).

Under any of these formulations, serious discrimination, particularly in voting, offends the due process clause. Certainly, the right to fair participation in the choice of one's own government is "of the very essence of a scheme of ordered liberty" and is a fundamental principle of liberty and justice lying "at the base of all our civil and political institutions." Arbitrary discrimination by the State in relation to the election of statewide officials is destructive of the

[17] Appellees asserted the due process claim in the complaint attacking the Neill Act (R. 11) and in the amended complaint attacking the 1962 Act (R. 80), but the court below did not reach the issue.

essential value of the right to vote: effective participation in democratic government."

It has been argued that the Fourteenth Amendment must either require exact equality among voters or else impose no restrictions upon a State. Although the former alternative may be the proper rule, at least in the case of the election of candidates for statewide office, laying it to one side does not force the conclusion that there are no applicable constitutional limitations. The equal protection clause prohibits only arbitrary discrimination—differentiation without rhyme or reason, or not reasonably related to a permissible state objective. Obviously the latter branch of the principle calls for taking into account the severity of the discrimination. For example, a purpose to assure geographical dispersion of support for statewide officials, as opposed to election through the solidly massed votes of landslide majorities in one or two cities, might conceivably justify a unit system under which each county was assigned units proportionate to its population; but that aim would not justify systematic dilution of the votes of urban and suburban citizens below their numerical proportion. Similarly, even if the desire to recognize such historical and political entities as towns or counties would support a modest departure from *per capita* equality of representation in apportioning seats in a single house of a legislature, it could not rationally be

[18] In *Harris* v. *Shanahan*, No. 90, 476, District Court, Shawnee County, Kansas, decided July 26, 1962, the court concluded that an unreasonable and arbitrary apportionment of seats in a state legislature is repugnant to the due process clause.

thought to be so overwhelming a need as to justify a total departure from the democratic principle that all voters are equal.

Nor is it a serious objection that the familiar tests long applied by this Court under the equal protection and due process clauses do not yield precise mathematical yardsticks when applied to legislative apportionment and the electoral process. The inevitable lack of mathematical precision—the inescapable fact that the line between two very close cases often seems to rest upon fiat rather than reason—may be more apparent here because apportionment and elections deal with numbers, but the problem pervades American constitutional law.[18a] Those who demand precise standards for exact mathematical measurement of any apportionment or step in electoral machinery forget that neither the equal protection nor

[18a] For example, the answer to the constitutional question whether a man has received a "speedy and public trial" as required by the Sixth Amendment must ultimately be measured in terms of an exact number of days' delay, but no one has ever suggested that the Court should undertake to state a mechanical rule or that no substantive right can be recognized because a trial after, say, 185 days is speedy but a delay of 186 days, under the circumstances, would violate the constitutional rights of the accused. As Mr. Justice Holmes said in *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41: "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other."

due process clause has ever been reduced to a mechanical yardstick. The answers must be found in case-by-case adjudication based upon constitutional practice, history, analogy to past adjudication, and an appreciation of the long-range ideals at the base of our civil and political institutions, using the established criteria outlined above.

Without endeavoring to foresee, and much less to resolve, all the questions that may arise we submit that the application of the foregoing principles establishes at least two minimal but useful requirements with respect to state legislative apportionment and the electoral system.

First, any apportionment or electoral system that produces utterly capricious divergencies in voting power, defying any intelligible explanation, violates both the equal protection and the due process clauses of the Fourteenth Amendment. The principle is illustrated by the Tennessee apportionment that came before the Court in *Baker* v. *Carr* where the elapse of 60 years and vast shifts in population since the last apportionment had produced a crazy-quilt of voting power lacking any justification. See *Baker* v. *Carr*, 369 U.S. 186, 226; see also *id.* at 258 (Justice Clark concurring); *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (on remand); *Moss* v. *Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla.). The condemnation of utterly irrational methods of apportionment, based upon neither intelligible principle nor practical accommodation between conflicting principles, but resulting only from inaction or the exercise of sheer

power, would go far to remedy the worst instances of malapportionment.

Second, the equal protection and due process clauses condemn any legislative apportionment or electoral system that imposes an extreme and invidious discrimination against any class of voters. By "invidious" we mean discrimination that is unsupported by any objective or justification which is properly relevant to the purposes of the legislative or electoral process. *Gomillion* v. *Lightfoot*, 364 U.S. 339, was such a case, although decided under the Fifteenth Amendment. See also *Scholle* v. *Hare*, 367 Mich. 176, 16 N.W. 2d 350, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 517, this Term (Justice Souris concurring); *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, 688, pending on appeal, No. 554, this Term. The present case, as we now show, not only helps to illustrate the second of these propositions but further demonstrates its validity.

B. THE GEORGIA COUNTY UNIT PLAN FOR CHOOSING CANDIDATES FOR STATEWIDE OFFICE RESULTS IN SYSTEMATIC, UNREASONABLE, AND THEREFORE UNCONSTITUTIONAL, DISCRIMINATION AGAINST VOTERS IN POPULOUS COUNTIES.

1. *The Georgia county unit plan results in gross and systematic discrimination against voters in every large or populous county*

The plain purpose and effect of the Georgia County unit system, as amended in 1962, are to dilute the votes of residents in Georgia's large or populous counties and to multiply the weight of votes in the smaller and less populous counties. The larger the

population of the county in which a man lives the smaller is the weight of his vote in selecting candidates for statewide offices.

The discrimination is accomplished in two steps. First, it is provided that the candidate who receives the highest number of votes in a county shall be given all the units assigned to that county, and the successful candidate is the one who receives a majority, not of the popular vote, but of the unit vote.[19] Second, units are assigned in a manner that discriminates against the larger and more populous counties. The amended statute assigns two units to every county with 15,000 people or fewer, a third unit for the next 5,000 people, a fourth unit for the next 10,000 people, a fifth unit for the next 15,000, a sixth for the next, and thereafter two units for each additional 30,000 people. See Appendix A, *infra*, pp. 65–71.

The immediate result of this imbalance is that less than one third of the voters in Georgia cast a majority of the unit votes, and can thus determine who shall be the Governor, Senators, and other statewide officials. The 50.4 percent of the people of Georgia living in the fifteen most populous counties have only 32 percent of the unit votes. Fulton County, with

[19] If a candidate received, in the first primary, both a majority of the unit votes and of popular votes actually cast, he would be elected. If no candidate received a majority of both unit and popular votes, a second primarily was to be held between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes. The candidate receiving the highest number of *unit* votes in this second primary would be elected.

556,326 people, has 14.11 percent of the State's population but only 7.02 percent of the unit votes.

The extent of the discrimination against voters in populous counties can be illustrated by a few specific comparisons. A vote in Crawford County, population 5,816, with 2 units, is worth almost five times a vote in Fulton County, population 556,326, with 40 units. A vote in Echols County, population 1,876, with 2 units, is worth 14 times a vote in Fulton County. Nor are these isolated examples. The following table shows the disparity for six counties of representative size (R. 49–53): The four largest counties are limited to one unit, on the average, for each

County	Population	Units	Population Per Unit	Ratio of voting Strength
Fulton	556, 326	40	13, 908	1. 00
Bibb	141, 249	12	11, 770	1. 18
Lowdnes	49, 270	6	8, 211	1. 69
Decatur	25, 203	4	6, 301	2. 21
Crawford	5, 816	2	2, 908	4. 78
Echols	1, 876	2	938	14. 83

12,889 people. The eleven smallest enjoy one unit for each 1,715 people. The resulting ratio is 7½ to 1. The 116 smallest counties whose total population is just about equal to the 1,160,030 people in the four largest counties enjoy 251 unit votes, against 90 for the four largest counties, a ratio of almost 3 to 1. In short, regardless of the basis of comparison, the current Georgia county unit plan systematically and grossly discriminates against voters in populous counties in statewide primary elections. The total control in the hands of voters residing in the less populous

counties is scarcely weakened by the fact that the system applies only to primary elections. For, as a matter of history, Democratic candidates have been elected, without exception, to every statewide office in Georgia since Reconstruction. Indeed, between 1900 and the current year, no other party has even nominated candidates in the general election.

2. Gross and systematic discrimination against urban and suburban voters violates the Fourteenth Amendment

The general constitutional principles discussed earlier in this brief make it plain that the equal protection and due process clauses condemn any discrimination that bears no reasonable relation to a permissible goal of state policy. See *supra*, pp. 36–38. A man's residence or the number of his neighbors is as irrelevant to his entitlement to vote as his wealth is irrelevant to his right to an effective appeal or his race or color to equal schooling. *Griffin* v. *Illinois*, 351 U.S. 12; *Brown* v. *Board of Education*, 347 U.S. 483. Political equality is one of the fundamental ideals of American life. A State may not favor rural against urban voters without rhyme or reason, nor out of the bold wish to preserve ancient political power. We know of no evidence that the people of the populous counties are half as intelligent or half as important as the voters in the less populated areas. In the absence of such evidence, the geographical discrimination is as invidious as discrimination among voters because of creed, height, weight, or national origin.

Discrimination against urban and suburban voters in statewide elections is condemned by constitutional

practice. Every State except Georgia, Mississippi, and Maryland tabulates all ballots equally and declares the candidate chosen by a majority or plurality the winner. Mississippi and Maryland, like Georgia, follow a county unit system, but whatever their validity, the Mississippi and Maryland election laws do not set up so systematic and so extreme discrimination against every citizen in a populous county, in favor of every citizen in a little county or one that is sparsely settled. At earlier times some statewide officials were not chosen by direct popular vote, but we know of no support in constitutional practice or history for systematically devaluating urban and suburban votes in statewide elections. Nor do appellants cite any constitutional provision or statute from any State, at any time in history, that gave voters in cities and large towns one-seventh the vote of a rural citizen in choosing an official to occupy statewide office.

The federal electoral college is not a precedent for the Georgia statute. In the first place, the weighting of votes in the electoral college never approaches the systematic discrimination under the Georgia county-unit system. At present, in the electoral college a majority is 270 votes. The 40 States with the smallest populations will cast 270 electoral votes; they have 43.21 percent of the population. In Georgia 31 percent of the population controls a majority of the unit votes. In the electoral college, New York, the largest State in the 1960 census, had 9.35 percent of the population; it has 7.99 of the electoral votes. In Georgia, Fulton County

has 14.11 percent of the population and only 7.02 percent of the unit votes.

Second, the electoral college is not analogous because it resulted from compromises which were required at the Constitutional Convention in 1787 in order for sovereign States to join in a new Nation. These compromises were made a part of the Constitution itself and are not affected by the Fourteenth Amendment. On the other hand, the counties in Georgia were never sovereign but are the creatures of the State. There is nothing in the federal Constitution even suggesting that the Fourteenth Amendment does not fully apply to efforts by Georgia to discriminate against voters in some of these counties. Cf. *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Simms*, No. 508, this term; *Mann* v. *Davis*, E.D. Va., decided November 28, 1962, and McKay, *Reapportionment and the Federal Analogy* (1962), rejecting the analogy between the upper house of a state legislature and the United States Senate.

There is no merit to appellants' suggestion that the gross discrimination against city and suburban voters is justified by the desire to distribute voting strength throughout the State. We recognize that in *MacDougall* v. *Green*, 335 U.S. 281, 283, the Court upheld a statute requiring a candidate of a new political party for statewide office to obtain a specified number of signatures on his nominating petitions in 50 of the 102 counties in Illinois, upon the ground that—

> It is allowable State policy to require that candidates for state-wide office should have sup-

port not limited to a concentrated locality. This is not a unique policy.

The decision has no weight here because the opinion carefully distinguished between "a proper diffusion of political initiative," which the statute secured, and the full opportunity that Illinois secured to the citizens of heavily populated counties "for exerting their political weight at the polls." *Id.* at 284.

Furthermore, there is no rational relationship in Georgia between the desire for geographical diffusion of political support and gross devaluation of the votes of urban and suburban citizens. In Georgia there is no danger that the massed votes in a single metropolitan area could dominate the entire State because of a landslide metropolitan vote for a single candidate. Fulton County, the largest, has only 14 percent of the population. Fulton, DeKalb, Cobb, and Clayton counties, the four counties including and surrounding Atlanta, have less than 24 percent of the population. The other populous counties are widely scattered, as shown by the table in the margin.[20] And even if it is constitutional to preserve the influence of rural voters in a statewide election against the weight of heavy majorities in a few districts where the popula-

[20] Other populous counties are as follows:

County	Population	Location
Bibb (Macon)	141, 249	Central.
Chatham (Savannah)	188, 299	Extreme east.
Dougherty (Albany)	75, 680	Southwest.
Floyd (Rome)	69, 130	Northwest.
Muscogee (Columbus)	158, 623	Extreme west-central.
Richmond (Augusta)	135, 601	Extreme east-central.

tion is denser, this could be accomplished by a system that gave each county a unit vote proportionate to its population. Any need for geographical diffusion is therefore utterly inadequate to justify Georgia's hostile discrimination against voters in populous counties scattered from side to side and from one end of the State to the other.[21]

The dilution of votes in a statewide election for Governor or Senator cannot be justified by the considerations often cited in defense of legislative apportionments that deny voters numerical equality of representation. The practical exigencies resulting from the need to limit the size of a deliberative body are inapplicable. While the composition of such a body may recognize a need for geographical distribution of representatives or reflect the identity of cohesive political entities, the election of a Governor by popular balloting does not call for debate and deliberation between representatives who might conceivably speak for different kinds of interests. In the latter case there is no need to choose between possible theories of representation.

Nor can it be said that the dilution of urban and suburban, and the enhancement of the value of rural

[21] There are also gross disparities in the weight given to voters in the same geographical areas. In central Georgia, Bibb County, with a population of 141,249 was given one unit vote per 11,770 persons, while neighboring Crawford County, with a population of 5,816, has one unit vote per 2,908 persons. In southern Georgia, Echols County, with a population of 1,876 has one unit vote per 938 persons, while adjoining Lowndes County, with a population of 49,270, has one unit vote for 8,235 persons. See also the Brief for the Appellee, pp. 22–23.

votes in the selection of statewide officials is merely a modest recognition of the interests of rural areas in one aspect of state government. In Georgia the same discrimination pervades the legislative apportionment and, in some instances, the selection of Congressmen. A resident of Fulton County had only one hundredth the representation of a voter in Echols County in the lower house of the legislature. Voters in counties having only 22 percent of the total population elected a majority of the lower house and voters from districts having only 21 percent of the population elected a majority of the State Senate.[22] On the other hand, the eight most populous counties, with 41 percent of the population, elected less than 12 percent of the lower house, and the 12 most populous senatorial districts, with 56 percent of the population, elected only 22 percent of the Senate.[23]

---

[22] In multi-county districts, the office of State Senator was rotated between the various counties and only voters in the county which was to furnish the candidate in the particular year could vote in the primary. Thus, if the existing apportionment had been applied in the 1962 election, voters in counties with 6 percent of the population would have nominated a majority of the State Senate.

[23] The composition of the state legislature is described in *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga.). In that case, a three-judge court held that at least one house of the Georgia legislature must be apportioned according to population and that the rotation of Senate seats among the counties in a particular district was unconstitutional. As a result, on October 5, 1962, the governor of Georgia signed a bill reapportioning the Georgia Senate. The 54 districts now vary in population from 57,000 to 82,000, and the nine most populous counties, with 43 percent of the population, elect 43 percent of the Senators. *Atlanta Constitution*, October 6 and 7, 1962. The lower house remains unchanged.

In most States where there is discrimination in the legislature against populous counties, it is at least partially balanced by the influence of the voters in such counties in electing the Governor and other statewide officials. Since the vote of every voter is counted equally, holders of statewide offices normally represent the wishes of the State as a whole. In Georgia, however, the county unit system has given the less populous rural counties control of every branch of state government: the Governor and other elected statewide officers; the legislature; and all state officials appointed by the governor, with or without the consent of the legislature. Since Georgia has no initiative and referendum and constitutional amendments can be passed only by two-thirds vote of the legislature, there is no way that domination of Georgia government by a rural minority can be ended except through the courts.[24]

The less populous counties also have disproportionate power in electing Georgia's representatives in Congress. The population of Georgia's Congressional districts varies between 824,000 in the Fifth District, covering Atlanta and most of its suburbs, to a low of 272,000. This discrepancy of over three to one is among the greatest in the country. In addition, Georgia was alone in permitting the use of a county unit system within a single Congressional district. In the Fifth District, for example, Fulton and De Kalb

[24] Numerous attempts were made in the legislature prior to *Baker* v. *Carr* to change the the county unit system to discriminate less severely against voters in the populous counties. All were unsuccessful.

Counties with populations of 556,326 and 256,782 respectively, had 6 unit votes each, while Rocksdale County with 10,572 population had 2 unit votes. Thus, Fulton County, with a substantial majority of the population of the district, had a minority of unit votes. The result was that candidates with a minority of votes could be, and were in fact, elected.[25]

Appellants argue (Br. 47–48) that the rural minority may be singled out for preferential treatment—to put it another way, that the urban majority may be subjected to adverse discrimination—because opportunities for political organization and hence for concerted group action are available in urban areas which are not similarly present in the rural counties. More specifically, appellants state: (1) that urban voters are able to make their weight felt in spite of their inferior voting strength, and (2) that opportunities are available in urban areas, unlike the rural counties, for regimentation along "group-interest" lines.

---

[25] The system of electing Congressmen in Georiga is described in *Wesberry* v. *Vandiver*, 206 F. Supp. 276 (N.D. Ga.), pending on appeal, No. 507, this Term: The unit system was applied within some, but not all, of Georgia's Congressional districts at the option of local officials of the Democratic Party. These officials determined, however, not to apply it in any district in the 1962 election and therefore all of Georgia's Congressional seats were determined on the basis of popular vote. However, the serious idscrimination against urban voters because of the population discrepancy between districts continues. In *Wesberry* v. *Vandiver*, a three-judge federal court dismissed a complaint challenging the apportionment of Georgia's Congressional districts on the ground of a want of equity.

There is no evidence to support the contention that urban voters are able to make their weight felt despite the discrimination against them. Indeed, the State of Georgia, by the county unit system as it existed before the decision below, absolutely prevented populous counties from having their fair share in the election of their executive officials, and this discrimination could not possibly have been offset by better political organization. Moreover, with the revolution in transportation and communication,[27] rural areas are not lacking in opportunity for political organization. Assuming that there are some disadvantages in political organization which persons in rural areas may suffer as compared to persons in urban areas, other remedies are available—for example, subsidizing candidates who secure a certain number of signatures so that they can better publicize their views throughout the State.

Appellants' argument that urban residents vote along group interest lines is also factually unsupported. "Bloc voting," *i.e.*, predictable voting, appears to be as prevalent in rural areas as in cities. See *One Man—One Vote, supra,* p. 7. Indeed, it may be argued with force that rural areas, with a less heterogeneous population and a closer identity of interest, have greater social pressures leading to political cohesion than do urban areas. See Emerson, *Malapportionment and Judicial Power,* 72 Yale L. J. 64, 73 (1962). And, as the affidavit of former Mayor

[27] Many politicians feel that it is easier to make news and get one's name known in country areas than in cities. See *One Man—One Vote, supra,* p. 7.

Hartsfield states, there is every reason to believe that the county unit system itself has a divisive effect and creates sectional and group interest blocs (R. 122–126). See also Cornelius, *The County Unit System of Georgia: Facts and Prospects*, 14 Western Political Quarterly 942, 948 (1961).

Moreover, it is incompatible with our political institutions to suggest that voting along economic or other lines of interest is an evil which a state legislature may attack by reducing the value of the votes of the members of the group. Thus, in *Gates* v. *Long*, 172 Tenn. 471, 113 S.W. 2d 388, the court considered the validity of a county unit system which had been instituted in Tennessee in order to diminish the impact of so-called "bloc voting" in Shelby County. The Tennessee Supreme Court, in ruling the system unconstitutional, stated (172 Tenn. at 478–479, 113 S.W. 2d at 391):

> In our form of government a large vote in a constitutional election cannot be regarded as an evil, and dealt with as such under the police power of the state. On the contrary, universal exercise of the right of suffrage must be regarded as the ideal support of democratic institutions. * * * restraint upon plenary participation, and the effect of such participation in a primary election, as well as in a regular election, is destructive of the very basis of either system. * * * Discrimination against the citizens of a particular county cannot be sustained on the bare ground that they took a large part in a primary election.

More fundamentally, the notion that any particular "community of interest" should be accorded greater voting strength than the number of people comprising the community warrants is inconsistent with basic democratic ideals. See Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 73 (1962); *One Man—One Vote*, *supra*, pp. 8–9. If one minority, such as rural voters, is to be guaranteed greater political power, there is no reason why other minorities, such as labor union members, businessmen, Catholics, Negroes, suburbanites, slum-dwellers, and persons over 65, should not have similar rights. The argument made on behalf of appellants comes down to the proposition that a State should be free to select a particular minority for preferential treatment in voting without any criteria whatever for making the selection. And if it may favor one, it may repress another. This, we submit, is the very essence of the arbitrariness that both equal protection and due process condemn.

Gross discrimination against populous areas and the arbitrary enhancement of the political power of rural voters not only subverts democratic principles generally; it also has the effect of precluding the States from meeting burgeoning needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban.[28]

[28] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy*, Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.).

See U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis*, written by the Editors of *Fortune* (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms as systematically discriminatory taxation of under-represented, generally urban, areas as contrasted with over-represented rural areas, far greater *per capita* spending by the State in over-represented rural areas than in the urban areas; and the denial even of the urban areas' proportionate share of matching funds provided by the federal government. In addition, the state legislatures have frequently refused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the discrimination is that urban governments now tend to by-pass the States and enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and water pollution facilities. This multiplication of national-local relationships reinforces the debilitation of state governments by weakening the States' control over their own policies

and their authority over their own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (The Kestnbaum Commission, whose members were appointed by the President) cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." After hearings on the Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, 85th Cong., 2d Sess., p. 47.

III

THE GEORGIA COUNTY UNIT SYSTEM IS INVALID UNDER THE FOURTEENTH AMENDMENT EVEN IF IT IS FOLLOWED PURSUANT TO A RULE OF A POLITICAL PARTY, RATHER THAN A STATUTE

Until the injunction was issued by the district court, the county unit system was operative by virtue of both the 1962 statute and a rule of the Democratic Party. The Party rule provided, like the Neill Primary Act before it was amended in 1962, that two unit votes were to be given for each representative from a particular county in the lower house of the legislature (Pl. Ex. 7, pp. 19–20, 22; R. 83). Thus, invalidation of the 1962 statute did not resolve the entire controversy. In addition to declaring the 1962 law unconstitutional, the district court enjoined appellant officials of the Democratic Party from conducting any

primary election on the basis of that law or under any Party rule which did not meet specified conditions (see the Statement, *supra*, p. 16; R. 204). It is necessary therefore to determine whether the injunction is proper insofar as it restrains appellants from acting pursuant to the party rule.

We recognize, of course, that the Fourteenth Amendment only reaches conduct which "may fairly be said to be that of the States." *Shelley* v. *Kraemer*, 334 U.S. 1, 13; accord, *Civil Rights Cases*, 109 U.S. 3; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715. But the conduct of a party primary is not "private" action free from constitutional restraints merely because that primary is conducted pursuant to party rule. *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649; *United States* v. *Classic*, 313 U.S. 299, 310–314; *Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4); *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875.

In the *Classic* case, the Court held that a primary election came within Article I, Section 2, of the Constitution (313 U.S. at 314):

> Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The

> primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.

In *Smith* v. *Allwright*, this Court made clear the nexus between the operation of a party primary and the commands of the Constitution applicable to state action (321 U.S. at 664):

> If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn* v. *United States*, 238 U.S. 347, 362.

And, in *Terry* v. *Adams*, the Court held that State action was involved in an election to choose nominees for the Democratic primary election. The Court relied on two facts: that the pre-primary was closely regulated by state law and that the pre-primary election in practical effect constituted the election since invariably the persons chosen prevailed in the primary and general election. 345 U.S. at 469, 473–476, 482–484.

The Georgia primary election was specifically considered in *Chapman* v. *King*, 154 F. 2d 460 (C.A. 5),

certiorari denied, 327 U.S. 800. There, the Court of Appeals for the Fifth Circuit concluded that the primary election in Georgia is such an essential part of the total election process, its conduct and management is so closely supervised by state law, and its effect is so clearly determined by statute that the action of the party in the conduct of its primaries constitutes state action under the Fourteenth Amendment (154 F. 2d 463–464):

> The State collaborates in these ways: It prohibits anyone to participate in any primary or convention of any political party who is not a qualified voter. Georgia Code, § 2–608, Constitution, Art. II [since repealed] Sect. 4, Par. 8. The State furnishes its list of registered voters and these voters alone are declared entitled to vote in primaries as well as in general elections. Georgia Code, § 34–405. And the State registrars are required to be at the court house during the voting hours of the primary as fixed by law § 34–2001a, to make corrections in the list [since repealed] § 34–411 (Supplement). The State requires the party to select election managers, and requires each manager to take an oath that he will fairly and impartially and honestly conduct the election according to the provisions of law. § 34–3201. If a voter is challenged, they are required to administer to him an oath that he is duly qualified to vote "*according to the rules of the party*, and according to the election laws of this State". § 34–3202. All the laws in reference to the qualification of voters and their registration are applied to primaries, and "No person who is not a duly qualified and registered

> voter according to law and *who is not also duly qualified in accordance with the rules and regulations of the party holding the same,* shall be entitled to vote in any such primary election." § 34–3218. If the challenged voter swears falsely, the State will punish him. § 34–9925. No one but a sworn manager can have any part in receiving or counting the votes. § 34–3205. The managers must turn over tally sheets, lists of voters, ballots and other election papers to the Clerk of the Superior Court to be kept under seal until the next grand jury meets if no contest is filed. § 34–3207. The managers are indictable for violation of their duty. § 34–9922, 34–9923. Generally all penal laws touching elections are extended to primaries, § 34–9933, Supplement; and § 34–9907.
>
> * * * * *
>
> We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery.

Thus, it is clear that, as in *United States* v. *Classic*, *Smith* v. *Allwright*, and *Terry* v. *Adams*, the primary election in Georgia is closely regulated by state law. Moreover, as in those cases, the Democratic primary for statewide offices in Georgia has determined the outcome of the general election—every person elected since the Reconstruction era has been the candidate of the Democratic Party chosen in the primary. In short, under the decisions of this Court,

the primary election in question constituted state action within the purview of the Fourteenth Amendment, whether conducted pursuant to state statute or party rule. Since, as we have seen, this state action violated the equal protection and due process clauses, the district court properly enjoined appellants from doing pursuant to party rule what they could not do under state statute.[28]

IV

THE DECREE SHOULD BE MODIFIED TO DELETE ITS ADVISORY PROVISIONS

The decree entered by the court below enjoined the conduct of primary elections under a county unit system prescribed by state law or party rule, unless the units were proportionate to population or involved no greater inequality then that prevailing in the electoral college or under the "equal proportions" system for representation of the States in Congress (R. 202–203). In formulating the conditions under which a county unit system would be upheld, the decree reached beyond the statute and party rule, and therefore beyond the situation directly before the court. We believe that the court below should not have undertaken to rule upon more than the electoral arrangements under the statute before it.

---

[28] Indeed, even where all the primary laws of a State were repealed, and a primary was thereafter held under rules, prescribed by the party, which were essentially the same as those embodied in the state laws, the Fifteenth Amendment has been held applicable. *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875.

As declared many years ago, the Court "is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constiutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39. And see, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21. In the present case it is sufficient to hold that the 1962 Georgia statute is unconstitutional and to enjoin appellants from conducting a primary election pursuant to it or to a rule of the Democratic Party with similar provisions. No other question is presented. Appellants have not threatened any other course of conduct under a different county unit system. Neither the parties nor the Court can presently foresee what action the legislature will take or whether it will give rise to a controversy. To adjudicate the constitutionality of a specific plan that the legislature has not adopted would seem to run the risk of interference in the political process and to have many of the dangers of an advisory opinion.

Accordingly, the order of the district court should be modified merely to prohibit appellants from conducting a primary election pursuant to the state statute, as amended in 1962, or to the rules of the Democratic Party of April 18, 1962 (which had the same provisions as the state statute before it was amended in 1962) (Pl. Ex. 7, pp. 19–22; R. 83) or any other party rules as discriminatory as the 1962 statute. This Court, of course, has the power to

modify, as well as to affirm or reverse, a decree. 28 U.S.C. 2106; *Hague v. C.I.O.*, 307 U.S. 496, 518.

CONCLUSION

We respectfully submit that the order of the district court should be modified to enjoin appellants from conducting any primary election according to the county unit system as provided either in the 1962 statute or the 1962 rules of the Georgia Democratic Party. In all other respects, the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
HAROLD H. GREENE,
DAVID RUBIN,
HOWARD A. GLICKSTEIN,
Attorneys.

DECEMBER 1962.

APPENDIX A

Neill Primary Act of 1917, as amended by the Act of April 27, 1962:

Ga. Code Ann., § 34–3212. County Unit Vote. [Ga. Laws 1962, Extra Sess. pp. 1217, 1218, 1221.] (a) Whenever any political party in this State shall hold a primary election for nomination of candidates for United States Senator, Governor, Lieutenant Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals, such party or its authorities shall cause all candidates for nominations for said offices to be voted for on one and the same day each year in which there is a regular general election, on such day as now or hereafter may be prescribed by law. Candidates for nominations to the above named offices who receive, respectively, the highest number of popular votes in any given county shall be considered to have carried such county, and shall be entitled to the full vote of such county on the county unit basis as more fully hereinafter set forth.

(b) County unit votes shall be allocated among the several counties of this State in accordance with the following bracket system.

Population of County	*Unit Votes*
0– 15,000	2
15,001– 20,000	3
20,001– 30,000	4
30,001– 45,000	5
45,001– 60,000	6
60,001– 90,000	8
90,001–120,000	10
120,001–150,000	12
150,001–180,000	14
180,001–210,000	16
210,001–240,000	18

Population of County	*Unit Votes*
240,001–270,000	20
270,001–300,000	22
300,001–330,000	24
330,001–360,000	26
360,001–390,000	28
390,001–420,000	30
420,001–450,000	32
450,001–480,000	34
480,001–510,000	36
510,001–540,000	38
540,001–570,000	40
570,001–600,000	42
600,001–630,000	44
630,001–660,000	46
660,001–690,000	48
690,001–720,000	50

and for each 30,000 population in excess of 720,000 said county shall be entitled to an additional (2) unit votes.

The county unit votes hereinbefore allocated shall be allocated according to the latest federal decennial census, or any future federal decennial census as officially published from time to time.

(c) If in any county any two or more candidates should tie for the highest number of popular votes received, the county unit vote of such county shall be equally divided between the candidates so tying. All such county unit votes shall within 10 days after such primary be accurately consolidated by the chairman and secretary of the State committee of the political party holding such primary, and published at least one time in a newspaper published at the Capital, within three days after the completion of the consolidation, certified under the hands and seals of said chairman and secretary; and the candidates for said offices, respectively, who shall receive a majority of all the county unit votes, throughout the entire State, upon the basis above set forth, shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or

other party authority, without the necessity of a formal ballot, to be the nominee of such party for the above named offices, respectively, and it shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held as the duly nominated candidates of such party for the offices named: Provided, that in the event there are only two candidates for any particular office referred to in this section, and it shall appear, after the consolidation of all the county unit votes throughout the State, that said candidates have received an equal number of county unit votes, the one who shall have received a majority of the popular votes shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for such office; and provided, however (except as hereinabove provided in case of a tie in unit votes) no political party holding a statewide primary for the nomination of candidates named in this section, as amended, shall declare any candidate for any such office the nominee of said party for such office unless such candidate shall have received in the primary a majority of all the county unit votes as hereinbefore provided for, and also a majority of all the popular votes cast in such primary. If no such candidate shall receive a majority of the county unit votes and also a majority of the popular votes cast in such primary, there shall be a second primary election for such office held in the manner provided in Section 34-3213, as amended; between the candidate receiving the

greatest number of county unit votes and the candidate receiving the greatest number of popular votes, but if the candidate receiving the greatest number of county unit votes also received the greatest number of popular votes, then the run-off shall be held between the candidate receiving the greatest number of county unit votes and the candidate receiving the next greatest number of popular votes. The results of such run-off primary election shall be determined and given effect as provided in said Section 34–3213, as amended.

(d) It shall be the duty of the State executive committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the name of such successful candidate is placed upon the tickets or ballots of such party at the general election following such primary and such successful candidate shall be considered, deemed and held as the duly nominated candidate of such party for the office named: Provided, further, that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts 1917, pp. 183, 184; 1950, pp. 79, 80; 1962).

Ga. Code Ann., §34–3213, Second Primary Election [Ga. Laws, 1962 Extra Sess., pp. 1221–1222.] In the event that a run-off Primary is required as provided in section 34–3212, as amended, such political party shall hold a second primary throughout the State on a day fixed by the State Executive Committee of the political party holding such primary, and such run-off primary shall be held between the candidates as provided in Code Section 34–3212, as amended. The vote in such run-off primary shall be consolidated and the result declared and certified within 10 days after said second

primary election, and published at least one time in a newspaper published at the Capital within three days after the completion of such consolidation, certified under the hands and seals of said chairman or secretary, and the candidate who shall receive a majority of the county unit votes throughout the State shall be declared by the State convention of the party holding such primary, or the permanent chairman thereof, or other party authority, without the necessity of a formal ballot, to be the nominee of such party for the particular office for which he is a candidate; and it shall be the duty of the State Executive Committee elected or appointed at such convention, or by its authority, or the chairman or secretary thereof, or other authority of such party, to see to it that the names of all such successful candidates shall be placed upon the tickets or ballots of such party at the general election following such primary, and such successful candidates shall be considered, deemed and held to be the duly nominated candidates of such party for the office named: Provided, that if both candidates for any office in said second primary election shall receive an equal number of county unit votes, after the consolidation of all the county unit votes of all the counties, then said State convention or the permanent chairman thereof, or the Secretary thereof, or other authority of such party, shall declare the candidate receiving the majority of the popular votes cast the regular nominee of such party for that particular office: Provided further that if no convention of such party shall be called or held, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts 1917, pp. 183, 185; 1950, pp. 79, 82).

Ga. Code Ann., § 34-3214. Convention, when held.—In each regular election year in which a second primary shall be necessary, by reason

of a failure of a candidate or candidates to receive a majority of the county unit votes at the first primary election, such party or its authority shall not hold its convention until after the expiration of 15 days from the date of such second primary election (Acts 1917, p. 188).

Ga. Code Ann., § 34–3215. Special primary elections to fill vacancies.—Special primary elections to fill vacancies in any of the offices referred to in this law shall be held on such date as may be fixed by the State executive committee of such party; but the same rules prescribed in this law for determining the result in general primary elections for the offices named shall govern in determining the result of any special primary election; and a second primary election shall be held within 15 days after the date of such first primary election, in the event no candidate receives a majority of all of the county unit votes throughout the State; and the same duties and obligations are hereby imposed upon the chairman, secretary, convention or other party authorities in the case of such special primary elections as are in this law imposed upon them in the case of general primary elections: Provided, that if no convention of such party shall be called or held, to follow a special primary election, the declaration of the result shall be made in such manner as may be prescribed by the State committee or other authority of such party (Acts 1917, p. 188).

Ga. Code Ann., § 34–3215.1 Certificate of result of election.—Immediately after the consolidation of the votes in any such primary election a certificate, showing the names of such candidates and the offices for which they are candidates, shall be filed in the office of the Secretary of State of this State; such certificate to be signed by the chairman and secretary of the State committee of the political party holding such primary. Said certificate

shall show by counties the total number of popular votes and the county unit votes received by each candidate in any such primary election (Acts 1943, p. 347).

Ga. Code Ann., § 34-3217. Limitations.—Nothing in this law shall be construed to provide or require any definite unit of election for candidates for nominations for members of Congress, judges of the superior courts, solicitors general, members of the General Assembly and county officers; and this law shall not be construed to require a primary for any of the last-named officials, except in their respective districts, circuits or counties, as provided by law: Provided, however, that primaries for nomination of members of Congress, judges of the superior courts, solicitors general and members of the General Assembly shall be held on the date named in section 34-3212 for primaries for United States Senator, Governor, Statehouse officers, Justices of the Supreme Court and Judges of the Court of Appeals (Acts 1917, p. 189).

Ga. Code Ann., § 34-3218. Laws of force.—All the laws in reference to the qualification of voters and their registration shall apply to said elections, and no person who is not a duly qualified and registered voter according to law and who is not also duly qualified in accordance with the rules and regulations of the party holding the same, shall be entitled to vote at any such primary election (Acts 1917, p. 189).

APPENDIX B

A. HISTORY OF THE GEORGIA COUNTY UNIT SYSTEM

The decision of the district court (R. 185–192) and an affidavit submitted by Professor Bonner of the Woman's College of Georgia (R. 93–119) contain an extensive discussion of the history of the county unit system which we will here only briefly summarize.[1]

The development of the county unit system as a method of nominating candidates for statewide office is closely tied to the principle of apportionment which Georgia has followed in its House of Representatives. From 1777 until April 27, 1962, the county unit system was based on the formula used for the apportionment of that body (R. 185). An understanding of the growth of the county unit system involves, therefore, a consideration of both the various methods that have been used for apportioning seats in the Georgia House of Representatives and of the genesis of the county unit system itself as part of the process of nominating candidates for statewide office.

---

[1] The history of the county unit system is also discussed in *Turman* v. *Duckworth*, 68 F. Supp. 744 (N.D. Ga.), and *South* v. *Peters*, 89 F. Supp. 672 (N.D. Ga.). For more detailed discussions, see Saye, *A Constitutional History of Georgia, 1732–1945*; Coulter, *Georgia, A Short History*; Gosnell and Anderson, *The Government and Administration of Georgia*; Holland, *The Direct Primary in Georgia*; Rigdon, *Georgia's County Unit System*; Cornelius, *The County Unit System of Georgia: Facts and Prospects*, 14 Western Political Quarterly 942.

1. *Apportionment of the Georgia House of Representatives*

Under Georgia's first Constitution in 1777, Liberty County was allotted fourteen representatives, Glynn and Camden Counties one each, the other five counties ten each, and the Ports and Towns of Savannah and Sunbury four and two representatives respectively to represent their trade. All counties thereafter to be laid out were to have one representative, provided there were ten electors in the county. Representation in all counties was to increase to two, three, four, six, and ten when the number of electors increased to thirty, forty, fifty, eighty, and one hundred, respectively. The representatives selected the Governor and also selected from their number an Executive Council composed of two representatives from each county entitled to elect ten or more representatives. The remaining representatives constituted the "House of Assembly." Voting was by individual ballot in the assembly while the Executive Council voted by counties and not personally (R. 185–186).

After Georgia entered the Union on January 2, 1788, the Constitution of 1789 was adopted. It created a general assembly consisting of a Senate and House of Representatives. Each county elected one Senator to serve for a three-year term. The members of the House were elected annually from each of the then existing eleven counties. Camden, Glynn, Effingham, Washington, Greene, and Franklin Counties were to have two members of the House each; Burke, Liberty and Richmond to have four each; and Chatham and Wilkes five each—a total of thirty-four. The Governor was elected by the Senate every two years from three persons nominated by the House of Representatives (R. 186).

The Constitution of 1798 provided that representation in the House should thereafter be according to population, based on an enumeration to be made every seven years. The formula adopted provided that a county with 3,000 persons would be entitled to two members; a county of 7,000 persons to three members, and a county of 12,000 or over to four members, with each county to have at least one and not more than four Representatives. The Governor continued to be elected by the entire General Assembly on joint ballot. In 1823, however, the Constitution was amended and Georgia became the first Southern State to provide for the popular election of its Governor[2] (R. 187).

The apportionment of both houses of the legislature was again altered in 1842–1843. At that time, forty-seven senatorial districts were created, each one with one Senator. In the House, the thirty-seven largest counties each were given two members, and the remaining fifty-six, one each; the total number of Representatives was fixed at 130. A new determination of the thirty-seven largest counties was required after each census. The same basis of House apportionment was carried forward, after secession, in the Georgia Confederate Constitution, and in the Constitution of 1865, which was adopted upon cessation of hostilities and during the Presidential Reconstruction of Georgia (R. 187).

Another constitution was adopted in 1868. It provided for the three-two-one formula of apportionment in the House, which, with slight modifications made in 1877 and 1920, has been in use in Georgia ever since.

---

[2] The amendment provided that if no candidate had a majority of the votes, the General Assembly would elect the Governor by joint ballot (R. 187). Nomination continued to be by the House of Representatives.

This apportionment gave to each of the six largest counties three Representatives; the next 31 largest counties were allotted two, and the remaining 95 were given one each. The 1868 Consititution provided that this apportionment might be altered after each census period, but the aggregate number of representatives was to remain at 175 (R. 187–188).

2. *The Nominating Process in Georgia*

After 1830 the convention system became the prevalent method of nominating candidates for statewide office. *Turman* v. *Duckworth*, *supra*, 68 F. Supp. at 747; Rigdon, *supra*, p. 15.[3] Delegates to these conventions usually were selected in mass meetings of party members in each county. The number of delegates sent by a county generally was double that of the county's representation in the lower house of the legislature. *South* v. *Peters*, *supra*, 89 F. Supp. at 677; Rigdon, *supra*, p. 15. The county unit basis for deciding the result in a state convention was used first by the Democratic Party in 1876 when each county at the state convention was entitled to twice as many delegates as it had representation in the lower house and was required to cast its allotted votes as a unit in the convention. Holland, *supra*, p. 46; Rigdon, *supra*, p. 16.

In 1890, the State Democratic Executive Committee recommended the use of primaries in selecting dele-

[3] Rigdon notes that during the 1830's the two principal parties in Georgia were identified with Michael Troup and John Clark. At that time, factions of the Board of Trustees of the University of Georgia acted as executive committees for both the Troup and Clark parties. Nominations for the governorship were generally made by caucusing groups on commencement day in Athens in every gubernatorial year.

gates to the state convention.[4] Eight years later in 1898, the Democratic Party required this procedure. Delegates from each county to the state convention were to be chosen by the county executive committee from the friends of the gubernatorial candidate receiving the largest popular vote in the county, and they were required to vote for state officers in the convention according to the vote of the people in their county. Saye, *supra*, p. 357; Holland, *supra*, p. 46. Accordingly, the convention generally merely ratified the primary choices. Rigdon, *supra*, p. 23. Thus, beginning in 1898, the Georgia Democratic Party was holding statewide primaries in which nominations were determined on the basis of a plurality of county unit votes. This method continued until 1906, when the state convention eliminated the county unit system and substituted nomination by popular vote. In 1908 the state convention voted to return to the county unit system.

The county unit system was not substantially changed until the passage of the Neill Primary Act of 1917. Ga. Code Ann. 34–3212, *et seq.* Under this Act, any political party holding a statewide primary was *required* to determine the winners by application

---

[4] Saye, *A Constitutional History of Georgia*, *supra*, pp. 356–357, describes the beginnings of state regulation of primary election procedures:

"An act of 1887 prohibited the giving or furnishing of liquor within a certain distance of polling places on election days and gave legal recognition to the existence of primaries, and an act of 1891 prescribed several regulations, but left their use optional with the political parties. Several laws on the subject were enacted during the first decade of the twentieth century including an act of 1904 making it a misdemeanor to buy votes and an act of 1908 requiring that primaries for the nomination of State officers be held on the same date in all counties. Yet primary elections continued to be governed largely by party custom and rules."

of the county unit system. The statute assigned to each county two units for each member of the House of Representatives, *i.e.*, the counties were given six, four, or two unit votes according to their population. The candidate who received a plurality of the popular votes in a particular county won all of that county's unit votes.[5] For all statewide officers except Governor and United States Senator, the candidate who received a plurality of the county unit votes over the State as a whole won the nomination. If two candidates received an equal number of county unit votes, the candidate with the greater number of popular votes won the nomination. In gubernatorial and senatorial races, if no candidate received a majority of county unit votes, a run-off primary between the two leading candidates was required. In the run-off the candidate receiving the largest number of unit votes won.

The original complaint in this case (see the Statement *supra*, pp. 5–6) attacked the constitutionality of the Neill Primary Act. But while the proceeding was pending in the district court, the statute was amended on April 27, 1962. The provisions of the 1962 act are fully described above (pp. 11–12), and are set forth in Appendix A to this brief (pp. 65–71).

B. LITIGATION CONCERNING THE GEORGIA COUNTY UNIT SYSTEM

1. In *Cook* v. *Fortson*, 68 F. Supp. 624 (N.D. Ga.), the first challenge to the county unit system, the plaintiffs sought to enjoin its application to the determination of the Democratic nominee for Congress in the Fifth District of Georgia. In an election held in that district, the winner had received

[5] In case of a tie, the county's unit votes were divided between the winners.

a majority of the county unit votes but not a majority of the popular vote. Injunctive relief was denied by the district court on the basis of *Colegrove* v. *Green*, 328 U.S. 549, the court stating that the inequality complained of should be left for consideration by the state legislature or by Congress under Article I, Section 4, of the United States Constitution. As an alternative basis for the decision, the court indicated that the State Democratic Executive Committee had, in effect, canceled the primary by certifying both candidates to the Secretary of State for inclusion on the general election ballot where all Democrats would be free to vote their choice on a popular vote basis. The court also expressed doubt as to whether the conduct of the primary involved "state action."*

2. Meanwhile, in *Turman* v. *Duckworth*, 68 F. Supp. 744 (N.D. Ga.), the plaintiff challenged the use of the county unit system in the 1946 statewide gubernatorial primary, in which the candidate receiving a majority of the county unit votes did not have the greatest number of popular votes. Again, the district court denied injunctive relief on the basis of *Colegrove* v. *Green*. It noted also that the plaintiff had not moved to assert the invalidity of the unit system before the Executive Committee had set the primary, or before it was too late to have another primary or even a convention nomination. Upon the assumption that an appellate court might consider the merits, the court went on to recognize that the conduct of the gubernatorial primary had to meet the

* The court noted that Ga. Code Ann. 34-3217 explicitly provided that the statute should not be construed to require any definite method of choosing the nominees for members of Congress. The court therefore concluded that if the county unit system were used in a primary election for Congress it was by determination of the party, not state action.

standards of the Fourteenth Amendment. However, it said that it had not been shown that the State had deprived the plaintiffs of the equal protection of the laws. The court found that there was a rational basis for the classification of Georgia's counties and that "[o]ur system of government; State and federal, has never sought or demanded that each voter should have equal voting influence, though that might seem an ideal of democracy." 68 F. Supp. at 748. Conceding that there was a "glaring inequality" between the representation of certain counties, the court nevertheless concluded that the remedy was through changes in the law rather than appeal to the law.

This Court dismissed appeals in both *Cook* and *Turman*,[1] citing only *United States* v. *Anchor Coal Co.*, 279 U.S. 812. The latter involved the dismissal as moot of a bill seeking an injunction.

3. In 1950, the county unit system was again challenged, this time before the primary was held. *South* v. *Peters*, 89 F. Supp. 672 (N.D. Ga.). The district court dismissed the suit, a majority of two judges sustaining the constitutionality of the statute providing for the county unit system. The court saw no discriminatory purpose behind the Neill Act, nor "any general constitutional principle forbidding or discouraging the use of territorial subdivisions in fixing the manner of conducting an election by the people. Whether subdivisions shall be made and how closely they shall be equalized is a matter of policy, that is to say, is a political question in which courts of equity may not meddle to set up their own ideas."

[1] Justices Black and Murphy stated that probable jurisdiction should be noted and Mr. Justice Rutledge urged that the question of jurisdiction be postponed until a hearing on the merits.

Id. at 679–680. Judge Andrews, dissenting, stated that the county unit sysem violated the equal protection clause of the Fourteenth Amendment. This Court affirmed *per curiam*, stating merely that "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U.S. 276–277. Justices Black and Douglas dissented (see *supra*, pp. 26–27).

4. Cox v. *Peters*, 208 Ga. 498, 67 S.E. 2d 579, was a suit for damages under 8 U.S.C. 43 against Georgia election officials alleging that a voter in the 1950 gubernatorial primary had been denied full enjoyment of his right to vote by reason of the county unit system. The Georgia Supreme Court affirmed a dismissal of the suit, holding (1) that the right to vote in a gubernatorial primary was not derived from the United States Constitution, and (2) that the Georgia constitutional and statutory provisions asserted were applicable only to elections not to primaries. This Court dismissed for want of a substantial federal question, without citing any authority. 342 U.S. 936 Justices Black and Douglas dissented.

5. Finally, in 1958, a suit was brought in the federal district court to have the 1958 Democratic primary for all statewide officers enjoined on the ground that the county unit system violated the Fourteenth and Seventeenth Amendments. When the district judge refused to convene a three-judge court, the plaintiff sought a writ of mandamus from this Court to compel its convening. *Hartsfield* v. *Sloan*, 357 U.S. 916. The Court refused to issue the writ, the Chief Justice and Justices Black, Douglas, and Brennan dissenting.

U.S. GOVERNMENT PRINTING OFFICE: 1963